SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 665

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HARRIET V. PENCE,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## REPLY BRIEF OF PETITIONER.

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WILLIAM B. COLLINS,
*Counsel for Petitioner.*

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## REPLY BRIEF OF PETITIONER.

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### Petitioner Did Not Consult a Physician in Regard to His Health Between March, 1920, and June, 1927.

Respondent in its brief under A, page 15-21, contends that Pence, the insured, did consult a physician during this period of lapse and that his representation to the contrary in his application for reinstatement was fraudulent. Respondent relies chiefly on the affidavit and the testimony of Dr. Grant Glickman.

Dr. Glickman was not an eye, ear, nose and throat man (R. 111). He finished his internship in 1925 and began working for the Government as a roentgenologist interpreting X-rays in 1926, in which capacity he was serving at the time of the trial (R. 113). An X-ray of Pence's sinuses was taken by a Government doctor at the Milwaukee Home

on 10-10-28, which showed (Plff's. Ex. 10, R. 185) "X-ray shows all sinuses clear" (R. 115). Dr. Glickman testified that X-rays taken by him of Dr. Pence at the National Home, Milwaukee, Wisconsin, on 11-12-30 showed Pence had sinusitis (R. 111), but when confronted with Plff's. Ex. 14 (R. 188) admitted that the report in that exhibit was correct. Over his signature in that report on these X-rays is the following:

> "Examination of accessory nasal sinuses reveals them as being normal" (R. 116).

Pence did not call Dr. Glickman to treat him at the National Home at Leavenworth, Kansas, between Jan. 16 and Jan. 26, 1927. The latter stated it was his official duty as officer of the day to call upon and treat Pence (R. 118-119). Harriet V. Pence denied that Pence ever consulted a physician with regard to his health between Feb. 1, 1920, and July 1, 1927 (R. 26), and denied that he was ever incapacitated during that period by any sickness, though he did have some colds (R. 27). She stated that he contracted colds from working over patients who had colds (R. 36). Dr. Glickman testified that she was present at the home when he treated Pence (R. 114).

Dr. Glickman testified that he made a written record at Leavenworth of these alleged treatments of Pence; that he did this as Officer of the Day, but Mr. Lytle, Counsel for defendant on the trial, stated that he had no such records and that he had a letter from Leavenworth, Kansas, stating that they had no such records. Counsel for defendant had been served with a notice to produce all such medical records while Pence was in the service (R. 113). Government records are not often lost or mislaid and the jury had a right to doubt the credibility of Dr. Glickman as a witness under all these circumstances; they had a right to believe that this Doctor signed the affidavit in Sept., 1928, in fur-

therance of a scheme to help Pence unjustly and that he thereafter felt he had to stand by his affidavit. The jury had a right to believe that an experienced E. E. N. & T. doctor like Pence would be quite unlikely either to call an X-ray man for such highly specialized treatment or to subject or submit himself to treatment at the hands of one as poorly qualified for such treatment as was Dr. Grant Glickman. They were the judges of the weight of this evidence and the credibility of these witnesses.

Dr. Burke, who is referred to on pages 18 and 24 of respondent's brief, never treated Pence professionally or was never consulted professionally by Pence and never made an examination of him (R. 126). Pence told Dr. Burke that "he wanted to get out of this practice because it was too hard being up nights and making calls and all that;" (R. 126). He further testified that (Pence) "he felt he wanted to get out where he wouldn't be getting out nights and working—yes, he wanted to get out of private practice. He gave me that reason for leaving. He was going into the government service if he could" (R. 126). • • • "Well, because it was too hard, and he had too many headaches." • • • "You see, a country practice is a pretty tough practice for anybody, and you get out any time, of course; any kind of weather, and that is pretty bad weather. We had bad roads out there in that country in '22 and '23." (R. 126); that he "wouldn't care to go into a country practice on roads like that." (R. 126)

In answer to the court's question Dr. Burke testified that primarily he wouldn't think a treatment for sinusitis would come under the classification of "disease of throat or lungs" (R. 126) referred to in question 11 (R. 171).

Dr. Royal F. French did testify that he treated Pence for sinusitis in the year 1919, but that was before the policy lapsed in March, 1920 (R. 123), and Dr. Burke tes-

lified that primarily that would not be classified as a disease of the throat or lungs (R. 126, 127).

Is it any wonder that Pence, who was approaching the age of fifty in 1922 and 1923, wanted to get out of private practice and away from midnight trips over bad country roads of Iowa in the year 1924 and 1925? Is it any wonder that he had a few colds with the very common touch of sinus trouble accompanying them? Who among us would not have been affected in like manner under the circumstances? A cold is not a disease and many persons have colds and do not consider them a disease.

We respectfully submit that Pence was not guilty of any fraud in his answers to questions in the application for reinstatement signed on June 21, 1927.

## The Seventh Amendment to the Constitution Has Been and Should Be Preserved.

We have pointed out in our preceding briefs that this Court has always sacredly given force and effect to the Seventh Amendment to the Constitution of the United States; that it has carefully exercised the power of an appellate court and has refrained from usurping the functions of the jury and the trial court. In our humble judgment circuit courts of appeal are bound by the same constitution and are likewise restricted in the exercise of their functions. So, too, the Congress of the United States has respected the Constitution and the Bill of Rights.

A few years ago when the Congress of the United States granted to this Court the power to revise the Federal Rules of Civil Procedure it was mindful of the sanctity of the Seventh Amendment to the Constitution of the United States. The law which conferred that power upon this Court is known as "The Act of June 19, 1934, Ch. 651"

and is found set forth in every official copy of "Rules of Civil Procedure for the District Courts of the United States" at page VII. Section 2 of said act provides that this Court may unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. "*Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate. * * *" [Act of June 19, 1934, C. 651, §§ 1, 2 (48 Stats. 1064), U. S. C., Title 28, §§ 723b, 723c.] In veterans' cases alone, twice during the past year this Court has shown its high regard for the Seventh Amendment to the Constitution.

*Berry* v. *United States,* 312 U. S. —, 61 S. Ct. 637, 638;
*Halliday* v. *United States,* 62 S. Ct. 438, 441.

With such "eternal vigilance" our liberties are secure.

Respectfully submitted,

WILLIAM B. COLLINS.